RECENT DECISIONS.

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ADJOINING LANDOWNERS — LATERAL SUPPORT — NEW YORK BUILDING CODE.—The Building Code of New York City, § 22, provides that all persons intending to excavate to a depth of more than ten feet below the curb shall from the commencement to the completion of the excavation preserve adjoining structures from injury. The defendant notified the building department of an intention to excavate more than ten feet, and proceeded to remove her old building, but stopped work upon reaching the bottom of its foundation walls nine feet below the curb. The plaintiff now sues for expenses incurred by him in shoring up his house to prevent it from being injured by the defendant's act. *Held,* one judge dissenting, he can recover. *Wear* v. *Koehler* (Sup. Ct. App. Term 1914) 88 Misc. 109.

Within the limits of New York City the ordinance cited has the force of a statute passed by the legislature. See City of New York *v.* Trustees (N. Y. 1903) 85 App. Div. 355. It places upon persons intending to excavate to a greater depth than ten feet the duty of making proper provision for the safety of adjoining buildings, not only after that depth has been reached but throughout the entire progress of the work, *Foster* v. *Zampieri* (N. Y. 1910) 140 App. Div. 471, and of leaving such buildings as safe after the excavation as they were before. *Bernheimer* v. *Kilpatrick* (N. Y. 1889) 53 Hun 316. Since the duty imposed is absolute, liability for failure to perform does not depend upon negligence, *Post* v. *Kerwin* (N. Y. 1909) 133 App. Div. 404, and cannot be shifted to an independent contractor. *Rosenstock* v. *Laue* (N. Y. 1910) 140 App. Div. 467; *cf. Bloomingdale* v. *Duffy* (N. Y. 1911) 71 Misc. 136. The judge dissenting in the principal case was of the opinion that until the defendant had removed all structures resting upon her land and had begun to dig below the level of their old foundations, she could not be said to have commenced "an excavation of either earth or rock" within the meaning of the act. While such a construction may be literally exact, § 2 of the Building Code declares that ordinance to be remedial and directs the courts to construe it liberally, and it therefore seems proper to include within the excavations affected by the Code any removal of the various subterranean structures with which the original soil has been replaced throughout a large portion of the city.

ADMIRALTY—MARITIME LIENS.—The claimant sought a lien on a vessel for services rendered in its construction and original equipment. *Held,* construing 36 U. S. Stat. L. 604, that a lien did not exist. *The Dredge A.* (D. C. E. D. N. C. 1914) 217 Fed. 617. See Notes p. 343.

AUTOMOBILES—MARKERS—FAILURE TO ATTACH.—The defendant paid the license fee for his automobile and was allotted a number, but failing to receive his marker from the Secretary of State, he operated his automobile one month later with the old marker still attached. *Held,* he could not be fined for running without the new marker, although a statute expressly required it. *State* v. *Gish* (Ia. 1914) 150 N. W. 37.

It is said that possession of a license is required for the purpose of enforcing payment of the license fee, and accordingly, it has been held that a defendant who has paid for and been granted a liquor license will not be fined for selling liquor before he actually receives the license. *State* v. *White* (1861) 23 Ark. 275. In some cases, a payment subsequent to the sale has been a defense where the license was antedated to cover the period of sale. *Bannoy* v. *State* (1878) 64 Ind. 447; *City Council* v. *Corleis* (S. C. 1831) 2 Bail. 186. This extension can be justified, however, only on the theory that the license has really been granted before the sale, and is not otherwise justifiable. *Elsberry* v. *State* (1875) 52 Ala. 8; *State* v. *Raymond* (1892) 12 Mont. 226. But where actual possession of the license is necessary to prevent an evasion of payment of the license fee, the same policy requires that the defendant should have the license in his possession. *Lewis* v. *Dugar* (1884) 91 N. C. 16. Where no payment has been made, there is no reason for allowing the defendant to excuse himself, even when he has tendered the fee to the proper official and been wrongfully refused. *State* v. *Myers* (1876) 63 Mo. 324. The statute in the principal case was intended to secure the payment of the license fee and to furnish identification of the automobile. Both of these purposes were accomplished by the defendant's payment of the fee and his use of the old marker, and if the theory of the foregoing cases is to be regarded as sound, it would seem that after waiting a reasonable time for the new markers, he was entitled to operate his machine. Such a construction has the effect, however, of overcoming the express intention of the legislature, and while it may be reasonable to suppose that the legislature did not intend to prohibit his use of his car where he was not in default, it might have been better policy to find the defendant guilty and to consider his payment of the fee as a ground for suspension of sentence.

CARRIERS—LIABILITY OF CONNECTING CARRIERS—CARMACK AMENDMENT.—In an action by a shipper against a connecting carrier for negligently injuring the plaintiff's horses in violation of its contract of transporation, *held,* the Carmack Amendment, 34 U. S. Stat. L., 595, to the Interstate Commerce Act, does not deprive the holder of a bill of lading of his right to sue a connecting carrier. *Elliott* v. *Chicago, Milwaukee & St. Paul Ry.* (S. Dak. 1915) 150 N. W. 777.

The English rule is, that in a through shipment only one contract arises, namely that between the shipper and the initial carrier, *Coxon* v. *Great Western Ry.* (1860) 5 Hurl. & N. *274, and that the connecting carrier is the agent of the initial carrier, and not such a party to the contract of carriage as may be sued directly by the shipper. *Bristol etc. Ry.* v. *Collins* (1858) 7 H. L. C. *194; *Mitton* v. *Midland Ry.* (1859) 4 Hurl. & N. *614. Although this view seems correct on principle, practically all American jurisdictions have allowed a recovery against the connecting carrier as well. Elliott, Railroads § 1441; *contra, Southern Ex. Co.* v. *Shea* (1868) 38 Ga. 519. Since, by the enactment of the Carmack Amendment, Congress intended to supersede all state statutes and regulations controlling the liability of interstate carriers, *Adams Ex. Co.* v. *Croninger* (1912) 226 U. S. 491, it might be urged that they also intended to supersede the common law of particular states on that subject, but no case has gone to this extent, and all remedies not actually inconsistent with the federal Interstate Commerce Act must be conceded still to remain in force until Congress

by express enactment has taken exclusive control of the subject. *Savage* v. *Jones* (1911) 225 U. S. 501, 533; *W. U. Tel. Co.* v. *Call Pub. Co.* (1900) 181 U. S. 92. As there is no federal common law as distinguished from that of the particular States, *W. U. Tel. Co.* v. *Call Pub. Co., supra,* if it were determined that the common law of the States is superseded by the Carmack Amendment, an action such as that in the principal case could be maintained only on the ground that upon the transfer of control of the liability of interstate carriers to the federal government, the common law applicable to such liability was also transferred to the federal jurisprudence. See 7 Columbia Law Rev. 199. The principal case, in regarding the remedy provided in the Carmack Amendment as cumulative rather than exclusive, *Uber* v. *Chicago etc. Ry.* (1913) 151 Wis. 431; *Otrich* v. *St. Louis etc. Ry.* (1910) 154 Mo. App. 420, is clearly correct.

CARRIERS—REJECTION OF GOODS BY CONSIGNEE—NOTICE TO CONSIGNOR.—Four days after the refusal of the consignee to accept a shipment of tomatoes, the carrier sold them at a loss without giving notice to the shipper, which would have required one day's time. *Held,* to relieve itself of its obligations as common carrier, the railroad should notify the consignor of the consignee's refusal to accept the goods, and the sale cannot be justified, if not required by the perishable nature of the goods, unless such notice is impossible. *Sauer* v. *Lehigh Valley R. R.* (Sup. Ct. App. Term, 1915) 150 N. Y. Supp. 977.

If a consignee refuses to accept goods, it is generally recognized that the carrier ceases to be subject to a carrier's liability and becomes a warehouseman, but some courts hold that this change in position cannot be effected until the carrier has notified the consignor or owner. *Nashville etc. Ry.* v. *Dreyfuss-Weil Co.* (1912) 150 Ky. 333; 2 Hutchison, Carriers (3rd ed.) § 721. Other courts indicate that such duty falls on the carrier in his capacity as warehouseman. *American Sugar Refining Co.* v. *McGhee* (1895) 96 Ga. 27. But the better view seems to be that there is no rule of law requiring notice, *Gregg* v. *Illinois Cent. R. R.* (1893) 147 Ill. 550; *Grossman* v. *Fargo* (N. Y. 1876) 6 Hun 310, although the circumstances of a particular case may be such as to justify a jury in deciding that failure to notify amounted to a breach of the carrier's duty to the owner. *Fine* v. *Barrett* (N. Y. 1913) 81 Misc. 234; see *Manhattan Shoe Co.* v. *Chicago, etc. R. R.* (N. Y. 1896) 9 App. Div. 172; *Kremer* v. *Southern Express Co.* (1869) 46 Tenn. 356. In selling the goods, however, the carrier is justified only by necessity, *Rankin* v. *Memphis etc. Packet Co.* (1872) 56 Tenn. 564; *Hull & Co.* v. *Missouri Pac. Ry.* (1895) 60 Mo. App. 593, and it is said that the carrier in such a case acts as agent for the owner. *Alabama etc. R. R.* v. *McKenzie* (1913) 139 Ga. 410; *Missouri etc. Ry.* v. *Cox* (Tex. 1912) 144 S. W. 1196. Certainly no necessity for the sale of articles, even of a perishable nature, would appear where the carrier had an opportunity to notify the owner, but failed to do so. *Missouri etc. Ry.* v. *Groce* (Tex. 1908) 106 S. W. 720; *Missouri etc. Ry.* v. *Cox, supra.* The principal case in laying down this rule seems sound, even though the New York Statute authorizing the sale of goods by carriers makes no mention of notice to the consignor. N. Y. Railroad Law, § 68.

CORPORATIONS — TORTS — LIABILITY OF STOCKHOLDERS.—A corporation of which the defendants were stockholders converted machinery belonging to the plaintiff. The stockholders were sued under a statute

rendering them liable to creditors to the amount of capital stock not paid in. *Held,* this liability did not include claims for tort. *Howard* v. *Long* (Ga. 1914) 83 S. E. 852.

Since the individual liability of stockholders is wholly statutory, see *Terry* v. *Little* (1879) 101 U. S. 216; 4 Thompson, Corporations, § 4725, special attention must be given to the language of the statute imposing it. Where the statutes are penal in nature, imposing a liability for the debts of the corporation because of some act or omission of the directors, they are strictly construed, and are held to include liability only for claims based on contract. *Chase* v. *Curtis* (1885) 113 U. S. 452; *Cable* v. *McCune* (1858) 26 Mo. 371. And even where the statutes are remedial, the term debts is generally held not to include liability for tort, on the ground that the purpose of the statutes is only to protect persons dealing with the corporation and relying on its credit. *Child* v. *Boston etc. Iron Works* (1884) 137 Mass. 516; *Heacock* v. *Sherman* (N. Y. 1835) 14 Wend. 58. Nor is a judgment rendered against the company in a tort action a debt within the purview of such statutes, *Savage* v. *Shaw* (1907) 195 Mass. 571; *Chase* v. *Curtis, supra;* but see *Cohen* v. *Toy Gun Mfg. Co.* (1912) 172 Ill. App. 330, even where the plaintiff could waive the tort and sue the company in quasi-contract. See *Avery* v. *McClure* (1908) 94 Miss. 172. Where, however, the statutes contain more comprehensive words than the term debts, as where the stockholders are rendered liable for the dues, acts, or liabilities of the corporation, they are generally construed so as to include liability for the corporation's torts. *Rider* v. *Fritchey* (1892) 49 Oh. St. 285; *Henley* v. *Myers* (1907) 76 Kan. 723; *Kelly* v. *Clark* (1898) 21 Mont. 291. The principal case in holding that a person who has a cause of action in tort is not a creditor within the meaning of the statute seems unduly to restrict its remedial purpose, especially in view of the broad definition of a creditor in § 3215 of the Georgia Code.

CONSPIRACY—FEDERAL PENAL CODE § 37—NECESSITY OF ALLEGING OVERT ACTS.—An indictment for conspiracy alleged, in addition to the actual conspiring, the commission of an overt act, but did not show the relation of such act to the ultimate object of the conspiracy. The indictment was *held* sufficient. *Houston* v. *United States* (C. C. A. 1914) 217 Fed. 852. See Notes, p. 337.

CONSPIRACY — WHITE SLAVE ACT — DEFENDANT INCAPABLE OF COMMITTING ULTIMATE CRIME.—The defendant was indicted for conspiring with a man that he should transport her in interstate commerce for immoral purposes. *Held,* a demurrer to the indictment should be overruled. *United States* v. *Holte* (1915) 35 Sup. Ct. Rep. 271. See Notes, p. 337.

CONSTITUTIONAL LAW—BLUE SKY LAWS—VALIDITY.—A West Virginia statute required all corporations and individuals dealing in stocks and bonds to file a statement of solvency and a description of the investments offered with the state auditor who should forbid the sale of such securities as seem to him unlikely to return a reasonable income. The dealer was also required to make annual financial reports, and if a non-resident, to agree to accept service of process on the state auditor as valid personal service. *Held,* the statute is unconstitutional as depriving individuals of their property without due process of

law, denying them the equal protection of the laws, and imposing a burden on interstate commerce. *Bracey* v. *Darst* (D. C. N. D. W. Va. 1914) 218 Fed. 482. See Notes, p. 350.

CONSTITUTIONAL LAW—FOREIGN CORPORATIONS—RIGHT TO SUE IN STATE COURTS.—A statute provided that no foreign corporation should transact business within the State, or maintain a suit in the state courts without first designating a resident agent and filing a copy of its charter with the Secretary of State. The plaintiff, without complying with the statute, sued to recover the price of an interstate shipment. *Held,* as the statute imposed unreasonable and burdensome restrictions on interstate commerce, it was contrary to the Commerce Clause and consequently unconstitutional. *The Sioux Remedy Co.* v. *Cope* (1914) 35 Sup. Ct. Rep. 57.

For a discussion of the contrary holding by the state court in the same case, and a criticism of that decision, for the reasons set forth by the Supreme Court, see 12 Columbia Law Rev. 271.

CONTEMPT—VIOLATION OF INJUNCTIONS—EXCUSE.—Pursuant to § 63 of the Insurance Law, the court issued an order, directing the superintendent of insurance to liquidate the business of a local corporation, and restraining all creditors from suing the corporation or from making any levy upon its assets. After being served with this order, the defendant filed a claim in the United States District Court of Virginia against the fund, deposited by the corporation as a condition of doing business within that State. *Held,* the defendant was guilty of criminal contempt. *People* v. *Richmond Radiator Co.* (N. Y. App. Div., 1st Dept. 1914) 150 N. Y. Supp. 398.

It is elementary that equity will not act directly upon a foreign *res,* but may, if the facts warrant, restrain a person within its jurisdiction from dealing unconscientiously with such property. So in the principal case the court could not direct any disposal of the fund in Virginia; but it might restrain the defendant from attempting to attach any part of it. It seems quite probable that the defendant might have had the order modified with respect to his rights in this fund, *cf. Matter of Binghamton etc. Co.* (1894) 143 N. Y. 261, but this fact does not justify his disobedience thereof. The good faith and belief of the defandant that he was not violating an injunction will not justify his action, though such circumstances mitigate the penalty imposed. *Young* v. *Rothrock* (1903) 121 Ia. 588; see *Roosevelt* v. *Edson* (1885) 7 N. Y. Civ. Pro. 7. Nor is it any excuse that the injunction was too broad or was granted for an insufficient cause. *C. U. Tel. Co.* v. *State* (1886) 110 Ind. 203; *Billard* v. *Erhart* (1886) 35 Kan. 616; see *Kaehler* v. *Dobberpuhl* (1883) 56 Wis. 497. In fact, to avoid the consequences of criminal contempt the defendant must show that the court granting it was entirely without jurisdiction and that the injunction was therefore void. *Ex parte Fisk* (1885) 113 U. S. 713; *Brown* v. *Moore* (1882) 61 Cal. 432; *Lewis* v. *Peck* (C. C. A. 1907) 154 Fed. 273.

CONTRACTS — DEFENSE — PLAINTIFF'S ILLEGAL MONOPOLY UNDER ANTI-TRUST ACT.—The plaintiff offered a percentage of its profits if the defendant would deal exclusively with it during a certain period. All purchases made by the defendant were accompanied by a clause in the contract of purchase to the effect that the goods were sold for

the defendant's own use and were not for resale. The defendant sets up, in defense to a suit for the price of the goods sold, that the plaintiff is an illegal monopoly, and that the contract of sale is void under the Anti-Trust Act. *Held*, the defense is not maintainable. *Wilder Mfg. Co.* v. *Corn Products Refining Co.* (U. S. Sup. Ct. October Term, 1914, No. 71). Not yet reported.

It is a general rule that the terms of an illegal contract will not be enforced. *Hanauer* v. *Doane* (1870) 12 Wall. 342; *McMullen* v. *Hoffman* (1899) 174 U. S. 639. Moreover, such a contract has the effect of rendering void any transaction or contract which is closely connected with it. See 1 Page, Contracts, § 506. It may be set up in defense, therefore, that a certain contract is in violation of an act of Congress, see *Bement* v. *National Harrow Co.* (1902) 186 U. S. 70, or any other law. See *Wheeler* v. *Russell* (1821) 17 Mass. 258, 281. But where the contract can be proved without reference to an illegal arrangement by virtue of which the plaintiff has violated a statute, illegality is no defense. *Cf. Dennehy* v. *McNulta* (C. C. A. 1898) 86 Fed. 825. So the fact that the plaintiff is a monopoly in violation of the Anti-Trust Act does not render its contracts invalid. *Connolly* v. *Union Sewer Pipe Co.* (1902) 184 U. S. 540; *cf. National Distilling Co.* v. *Cream City Importing Co.* (1893) 86 Wis. 352. If, however, the plaintiff seeks to recover for goods which were sold in pursuance of, and as part of an illegal contract, binding on both parties, it is a good defense that the enforcement of the contract will result in giving effect to a violation of the Act inhering in the sale. *Continental Wall Paper Co.* v. *Voight & Sons Co.* (1909) 212 U. S. 227; 9 Columbia Law Rev. 343. In the principal case it was conceded that the sale, despite the conditions, was intrinsically legal, and the court therefore refused to regard either the sale or the conditions illegal merely because the plaintiff was a monopoly and may have been aided as such by the conditions which formed a part of the sale.

Contracts—Statutes—Effect of Invalidity.—Certain provisions with reference to the non-employment of aliens were inserted in a contract in compliance with § 14 of the Labor Law. *Held*, since the statute is unconstitutional, the provisions in the contract become inoperative. *Heim* v. *McCall* (1914) 150 N. Y. Supp. 933.

An unconstitutional statute does not become a part of a contract made after such statute is passed and before it is declared unconstitutional, where the contract does not expressly incorporate the provisions of the statute. *Palmer* v. *Tingle* (1896) 55 Oh. St. 423. Even when the provisions of an unconstitutional statute are expressly incorporated in a contract in obedience to the statute, as in the principal case, they have been uniformly regarded as inoperative, *People* v. *Coler* (1901) 166 N. Y. 1, 21; *Cleveland* v. *Construction Co.* (1902) 67 Oh. St. 197, 220, apparently in violation of the principle that full effect must be given to a writing incorporated in a contract by reference. 2 Page, Contracts, § 1115. It is said that the injected provision is supported solely by the statute, because the parties did not agree to it, and therefore falls if the statute is void. But the fact that the contractor signed the contract proves his assent to the terms imposed by the other party, and his agreement was therefore quite voluntary. See dissent of Parker, C. J., in *People* v. *Coler, supra,* p. 38. Even assuming the correctness of the argument in the majority opinion, it is difficult to see how there can be a contract without a meeting of the minds. What

the court really does is to read into the contract a proviso that these stipulations are to be effective only if the statute is valid. The other suggestion of the court, that the provisions are in derogation of rights protected by the Constitution, even if sound, would also be fatal to the rights of the contractor because although the contractor would not be bound by the illegal provision in such a case, *Insurance Co.* v. *Morse* (1874) 87 U. S. 445, the whole contract would be void, the illegal consideration not being severable. *Bishop* v. *Palmer* (1888) 146 Mass. 469; *Haynes* v. *Rudd* (1886) 102 N. Y. 372. The decision of the court may be justified by a desire to prevent the legislature from enforcing an invalid law.

CORPORATIONS—STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS.—In an action by the receiver of a corporation in behalf of creditors to enforce the payment of corporate debts from unpaid subscriptions, *held,* the stockholders could not avoid liability on the ground that the whole amount of the capital stock had not been subscribed. *Silvain* v. *Benson* (Wash. 1915) 145 Pac. 175.

In the absence of statute, stockholders are not individually liable to the creditors of the corporation. *Toner* v. *Fulkerson* (1890) 125 Ind. 224. Creditors may, however, under certain conditions, compel a subscriber to contribute the unpaid amount of his subscription to the payment of the corporate debts. If the corporation is solvent and the stockholder's liability on the contract of subscription has matured, it can be reached by a creditor through garnishee process in execution of a judgment recovered against the corporation. See *Simpson* v. *Reynolds* (1880) 71 Mo. 594; *Lane's Appeal* (1884) 105 Pa. 49, 63. This remedy is rather limited, however, since the creditor is in no better position to enforce the claim than the corporation would be; *Exposition R. Co.* v. *Canal St. R. Co.* (1890) 42 La. Ann. 370; *McKelvey* v. *Crockett* (1884) 18 Nev. 238; and since non-subscription to the full capital stock is a defense to an action against the stockholder by the corporation, *Stoneham R. R. Co.* v. *Gould* (Mass. 1854) 2 Gray 277; *Haskell* v. *Worthington* (1887) 94 Mo. 560, it would also be a defense to garnishment proceedings by the creditor. *Exposition R. Co.* v. *Canal St. R. Co., supra.* Where, however, the corporation is insolvent, a more liberal remedy is open to the creditors. The capital stock, including the balance unpaid thereon, is treated as a trust fund for the payment of the corporate debts, and if a bill is filed in equity in behalf of the creditors, the stockholder is not allowed to set up any defenses he might have against the corporation which would lessen the amount of capital held out to persons dealing with the corporation. *Upton* v. *Englehart* (C. C. 1874) 3 Dill. 496; *Hatch* v. *Dana* (1879) 101 U. S. 205; *Hamilton* v. *Railroad Co.* (1891) 144 Pa. 34. These equitable principles have likewise been applied in actions at law by the assignee in bankruptcy of the corporation against the stockholders, *Sanger* v. *Upton* (1875) 91 U. S. 56, and in actions by a receiver in behalf of creditors, *Farnsworth* v. *Robbins* (1887) 36 Minn. 369, so the result reached in the principal case seems correct.

CRIMINAL LAW—BURGLARY—BREAKING OUT OF A BUILDING—NEW YORK PENAL LAW, § 404(2).—The defendant entered a building through an open door, closed it, re-opened it after committing a crime within the building and escaped through the doorway. *Held,* two justices dissenting, this was not burglary under § 404(2) of the Penal Law.

People v. *Toland* (N. Y. App. Div., 3rd Dept. 1915) 151 N. Y. Supp. 482.

Breaking out of a building after committing a crime within is generally not burglary in the absence of express statutory provision. 2 Bishop, New Criminal Law (8th ed.) § 99; *Brown* v. *State* (1876) 55 Ala. 123; *White* v. *State* (1874) 51 Ga. 285; *contra, State* v. *Ward* (1876) 43 Conn. 489. In New York "A person who * * * being in any building commits a crime therein and breaks out of the same is guilty of burglary in the third degree." N. Y. Penal Law, § 404(2). Whether an exit made through a door opened by the defendant is burglarious, according to the prevailing opinion, depends upon the agency by which it was originally closed, but the reasoning advanced in support of this theory is unsatisfactory, and the court appears to have been influenced by the difference between the penalties imposed for burglary and petit larceny. Provided the door was opened by the defendant himself it seems immaterial by whom it was closed. It has long been recognized that opening a closed door is sufficient breaking to render a subsequent entry burglarious; Bishop, Statutory Crimes (3rd ed.) § 312; *State* v. *Wilson* (1793) 1 N. J. L. 439; and the identical act performed for purposes of exit seems equally to be a breaking, *Rex* v. *Callan* (1809) R. & R. 157; *Rex* v. *Lawrence* (1830) 4 C. & P. 231; *Regina* v. *Wheeldon* (1839) 8 C. & P. 747; *cf. Lawson* v. *Commonwealth* (1914) 160 Ky. 180, although under a rather narrow interpretation of § 400, defining the word "break", the result reached in the principal case might be justified. 52 N. Y. L. J. 2046. The test established by the principal case seems artificial, and unfortunate from the viewpoint of public safety. If it were consistently applied the question whether a man is guilty of murder or manslaughter would, under some circumstances, depend upon whether he burst through a closed door in flight or merely pushed it open. See N. Y. Penal Law, § 1044(2); § 404(2); § 407(3); § 2 "Felony"; § 1050(1); § 1299. *People* v. *Meyer* (1900) 162 N. Y. 357.

DESCENT AND DISTRIBUTION—TAXATION—VESTED INTERESTS.—An administrator sued to recover back a tax paid under the War Revenue Act of 1898 on a distributive share passing under the intestacy laws. *Held,* as the distributee's interest could not vest in possession and enjoyment before distribution, it was until then contingent, and was recoverable under a statute providing for the refunding of taxes collected on contingent interests not vesting in possession and enjoyment prior to the date of repeal of the tax. *United States* v. *Jones* (1915) 35 Sup. Ct. Rep. 361.

Upon the death of an intestate the legal title and right to possession of his personal property passes to the administrator, *Scruggs* v. *Scruggs* (C. C. 1900) 105 Fed. 28; *Lawrence* v. *Wright* (1839) 40 Mass. 128, who holds the property in trust for the distributee. *Thompson* v. *Thomas* (1855) 30 Miss. 152. At common law the right of the distributee was regarded as an equitable right to compel the administrator ultimately to account for the estate, *Pritchard* v. *Norwood* (1892) 155 Mass. 539, a right which develops into a legal title upon distribution. See *Perryman* v. *Greer* (1863) 39 Ala. 133. Under statute, legal title is frequently said to vest on the death of the intestate, distribution merely serving to ascertain the property to which it attaches. *Moore* v. *Gordon* (1867) 24 Ia. 158. Nowhere, however, is the distributee entitled to possession upon the death of the intestate

as against the administrator. *Jahns* v. *Nolting* (1866) 29 Cal. 508; *Scruggs* v. *Scruggs, supra.* His interest, therefore, like that of a legatee is too unsubstantial and empty to justify taxation before the right to possession accrues. *Matter of Curtis* (1894) 142 N. Y. 222. As the tax in the principal case was imposed on succession, *Knowlton* v. *Moore* (1900) 178 U. S. 41, 56, it could not attach until the successor was entitled to ownership. *Mason* v. *Sargent* (1881) 104 U. S. 689. The courts are unwilling to impose the burden of a tax on a right which is only technically vested. *Vanderbilt* v. *Eidman* (1905) 196 U. S. 480. The distributee must have entered upon the enjoyment of his legacy or share in order that his interest may be truly vested. See *United States* v. *Fidelity Trust Co.* (1911) 222 U. S. 158. The interest of the distributee in the principal case, moreover, was clearly a "contingent interest not vesting in possession," within the language of the refunding clause, and the tax was therefore recoverable by the administrator.

EVIDENCE—CROSS-EXAMINATION OF MEDICAL EXPERT—ADMISSIBILITY OF MEDICAL BOOKS.—Without referring to any specific medical book, a medical expert gave an opinion concerning a certain fact based largely upon his reading and upon the authorities. On cross-examination counsel sought to read from a medical treatise and to ask the witness if he concurred. *Held,* this was not objectionable, as it was aimed to test the doctor's knowledge and the reliability of his data. *State* v. *Brunette* (N. Dak. 1914) 150 N. W. 271.

While medical books may not be read to the jury as evidence of the facts and theories therein expressed, *Union Pac. Ry.* v. *Yates* (C. C. A. 1897) 79 Fed. 584; 10 Columbia Law Rev. 267, if an expert witness bases his opinion on works of standard repute and cites a certain authority to fortify his opinion, such authority may be produced on cross-examination and used for the purpose of contradicting his testimony by showing that it does not support him. *Pinney* v. *Cahill* (1882) 48 Mich. 584; *Eggart* v. *State* (1898) 40 Fla. 527, 538; *Clark* v. *Commonwealth* (1901) 111 Ky. 443. But when the expert makes no reference to any medical authority as the basis of his opinion, the use of texts on cross-examination is generally prohibited, since they serve only to inform the jury that an opinion adverse to that of the witness exists, and their admission would be merely an evasion of the rule excluding them as evidence. *Bloomington* v. *Schrock* (1884) 110 Ill. 219; *Hall* v. *Murdock* (1897) 114 Mich. 233; *Butler* v. *Railroad Co.* (1902) 130 N. C. 15; *contra, Hess* v. *Lowery* (1889) 122 Ind. 225; *Clukey* v. *Seattle Electric Co.* (1901) 27 Wash. 70, 75. It would seem that the same reasons for forbidding such cross-examination should apply where, as in the principal case, the expert bases his opinion upon his reading of the authorities in general, but refers to no specific book, for such examination simply contradicts or qualifies the opinion of the witness by showing what some author has said. *Mitchell* v. *Leech* (1903) 69 S. C. 413.

INSURANCE—DESCRIPTION OF CHATTEL—VALUED POLICY.—The defendant insured the plaintiff's pictures as genuine "old masters" at specified values. They were, in fact, chromo copies. *Held,* since the pictures were not the property described in the policy, the plaintiff cannot recover for their loss even if he honestly believed them to be as he represented. *Petow* v. *North British & Mercantile Ins. Co. of London & Edinburgh* (N. J. 1914) 92 Atl. 272.

In the case of a valued insurance policy, over-valuation, however gross, will not work a forfeiture unless it be fraudulent, *Sturm* v. *Atlantic Mut. Ins. Co.* (1875) 63 N. Y. 77; *Patapsco Ins. Co.* v. *Briscoe* (Md. 1835) 7 Gill. & J. 293; *Barker* v. *Janson* (1868) L. R. 3 C. P. 303; Elliott, Insurance, § 333, nor will it be taken as conclusive evidence that the contract was a gambling one. *Coolidge* v. *Gloucester Marine Ins. Co.* (1819) 15 Mass. 341. But in general a material misrepresentation of fact, whether innocent or wilful, will avoid an insurance policy, Richards, Insurance, 128; Elliott, Insurance, § 114, and the misrepresentation as to the genuineness of the pictures in the principal case, though it did not mislead the insurer as to their combustibility, undoubtedly induced the making of the contract insuring them at an excessive valuation. Since a contract induced by innocent misrepresentation may be rescinded, 15 Columbia Law Rev. 187, the decision in the principal case can be supported on the ground that the policy was voidable, though the position taken by the court seems untenable, since it is clear that the chromos were the pictures described, however wrongly described, in the policy.

JUDGMENTS—REPRESENTATION—PERSONS NOT IN ESSE.—In a partition suit, the living owners instead of making provision for the contingent interests of their unborn children proceeded on the theory of absolute ownership. An action was later brought for specific performance by a person who claimed title through the judgment in the partition proceedings for the sale of the property. *Held,* the plaintiff's title was defective, since living owners may represent the interests of unborn persons in the property, only when all the interests are similar. *Adami* v. *Gercken* (N. Y. 1914) 164 App. Div. 472. See Notes, p. 346.

LIBEL AND SLANDER—REPETITION OF CHARGES OF ANOTHER.—A newspaper published a statement that certain named persons "claim to have learned" of improper acts on the part of a public official. *Held,* the libel could not be defended on the ground that it was the bare statement of a charge made by another. *Walling* v. *Commercial Advertiser Assn.* (N. Y. 1914) 165 App. Div. 26.

As the result of a dictum in an old English decision, *Earl of Northampton's Case* (1613) 12 Coke *132, the doctrine grew up that a person who in good faith merely announces without indorsement that charges have been made by another whose name is given is not liable for slander. *Tatlow* v. *Jaquett* (Del. 1834) 1 Har. 333; see *Jarnigan* v. *Fleming* (1871) 43 Miss. 710. The dangers of permitting the unrestricted circulation of slanderous statements have led most courts to reject this doctrine, and it is not the general law at the present time. *Branstetter* v. *Dorrough* (1882) 81 Ind. 527; *Fowler* v. *Chichester* (1874) 26 Oh. St. 9; *Davis* v. *Sladden* (1889) 17 Ore. 259. But no court, whether accepting or rejecting this rule as to slander, extends it to libel. *Dole* v. *Lyon* (N. Y. 1813) 10 Johns. *447; *Hagener* v. *Pulitzer Pub. Co.* (1912) 172 Mo. App. 436; *Times Pub. Co.* v. *Carlisle* (C. C. A. 1899) 94 Fed. 762. To justify a written statement that certain defamatory charges have been made by another, it is not sufficient to show that such charges have actually been made, but the truth of the substance of the charges must be established. *Ropke* v. *Brooklyn Daily Eagle* (1887) 9 N. Y. St. Rep. 709; *Meeker* v. *Post Printing etc. Co.* (1913) 55 Colo. 355. Since false charges

of specific offenses against public officers are libelous and not privileged as fair comment, *Hamilton* v. *Eno* (1880) 81 N. Y. 116, a person repeating such charges, even as the assertion of another, would seem, on reason and authority, guilty of libel himself.

MARINE INSURANCE—ACCEPTANCE OF ABANDONMENT BY INSURER.—The owner of a sunken ship gave notice of abandonment, which the insurer refused to accept. The insurer then raised the vessel and tendered her back without repairs, but the owner refused her and sued for a total loss. *Held*, the clause in the policy allowing the insurer to raise and repair without accepting did not protect his act of raising alone, which amounted to an acceptance of the abandonment, regardless of the original right to abandon. *Alliance Ins. Co.* v. *Producers' Cotton Oil Co.* (Miss. 1915) 67 So. 58.

It has long been settled in Massachusetts that the insurer even after abandonment, may repair and promptly return an abandoned ship in order to show that she was not a constructive total loss. *Peele* v. *Suffolk Ins. Co.* (Mass. 1828) 7 Pick. 254; *Commonwealth Ins. Co.* v. *Chase* (Mass. 1838) 20 Pick. 142. In the federal courts, however, any dominion by the insurer subsequent to notice of abandonment was held to be in acceptance thereof. *Peele* v. *Merchants' Ins. Co.* (C. C. 1822) 19 Fed. Cas. 98. To avoid the operation of this rule, a clause was inserted in marine policies authorizing the insurer to recover the ship without thereby accepting the abandonment. But unless the act of the insurer is done in a reasonable time and in accordance with the terms of the clause, it is not authorized thereby and is deemed an act of ownership consistent only with an acceptance of the abandonment. *Norton* v. *Lexington etc. Ins. Co.* (1854) 16 Ill. 235; *Copelin* v. *Insurance Co.* (1869) 9 Wall. 461; *Hume* v. *Frenz* (C. C. A. 1907) 150 Fed. 502. A strict interpretation of the policy in the principal case does not authorize raising without repairing, and therefore the insurer's dominion is properly held to imply acceptance. *Northwestern Transp. Co.* v. *Continental Ins. Co.* (C. C. 1885) 24 Fed. 171; *Copelin* v. *Phoenix Ins. Co.* (1870) 46 Mo. 211. Since the abandonment was accepted, it becomes immaterial whether there was originally such constructive total loss as would give the owner the right to abandon. *Norton* v. *Lexington etc. Ins. Co., supra; Copelin* v. *Insurance Co., supra; Richelieu etc. Nav. Co.* v. *Thames etc. Ins. Co.* (1888) 72 Mich. 571.

MUNICIPAL CORPORATIONS — NECESSITY OF FILING CLAIM IN TORT — INFANCY.—A statute required a person injured by the negligence of a town to file a claim for his injuries within 60 days after the cause of action accrued. The claim of the plaintiff, an infant of five years, whose mother was living, was not filed until 23 months after such injury, when the suit was brought by her mother as guardian *ad litem*. *Held*, immature infancy is such physical and mental disability as to exempt the infant from the operation of the statute. *Murphy* v. *Village of Fort Edward* (1915) 213 N. Y. 397.

Statutes compelling persons injured by the negligence of a town to file their claims before commencing action, usually do not expressly exempt infants. *Winter* v. *Niagara Falls* (1907) 190 N. Y. 198; *Peoples* v. *Valparaiso* (1912) 178 Ind. 673. Nor is an infant in such cases protected by § 396 of the New York Code of Civil Procedure which releases infants from the operation of the Statute of Limitations,

Winter v. *Niagara Falls, supra,* since it is well settled that statutes like the one under consideration are not merely Statutes of Limitations, so that failure to comply with their requirements constitutes a defense. Such legislation rather makes the filing of a notice a condition precedent to the maintenance of the action, the performance of which must be alleged in the complaint in order that it is valid on demurrer. *Reinung* v. *Buffalo* (1886) 102 N. Y. 308; *Curry* v. *Buffalo* (1892) 135 N. Y. 366; *Susenguth* v. *Rantoul* (1880) 48 Wis. 334. The courts, however, in construing statutes like that in the principal case have held that physical and mental incapacity is a sufficient excuse to release the injured person from compliance with the statute, *Ehrhardt* v. *Seattle* (1903) 33 Wash. 664; *Forsyth* v. *Oswego* (1908) 191 N. Y. 441, and immature infancy might very well be considered as such mental and physical disability to exempt a very young child from the operation of the statute. *Contra, People* v. *Valparaiso, supra.* Although filing of claim by the guardian is filing by the infant, *Taylor* v. *Woburn* (1881) 130 Mass. 494, still, since the statute imposes no direct duty upon the guardian, the decision in the principal case seems desirable in order to protect the interests of the infant.

Negotiable Instruments—Accommodation Maker—Discharge.—In a suit by the payee of a promissory note, a joint maker defended on the ground that, since he had signed merely for accommodation, he was discharged by the payee's release of collateral security without his consent. *Held,* since the payee is not a holder in due course, the note in his hands is as though non-negotiable, under § 58 of the Negotiable Instruments Law, and the defense is therefore available. *Long* v. *Shafer* (Mo. 1914) 171 S. W. 690.

Prior to the enactment of the Negotiable Instruments Law, the maker of a promissory note might show that he signed merely as surety, and in such a case any acts of the creditor which altered the surety's right of recourse against the principal debtor, such as granting an extension of time, or discharging collateral security, would discharge him. *Hubbard* v. *Gurney* (1876) 64 N. Y. 457; *Guild* v. *Butler* (1879) 127 Mass. 386. While the Negotiable Instruments Law does not expressly abrogate this doctrine of the law of suretyship, it has been held to have that effect so far as accommodation makers are concerned, because as makers they come within the definition of persons primarily liable, and in the provisions for the discharge of the instrument the old defenses of a surety are not included. The question has usually arisen in cases where the creditor has extended the principal debtor's time for payment, and the result has generally been the same whether the creditor was a payee, *Vanderford* v. *Farmer's etc. Bank* (1907) 105 Md. 164; *Cellers* v. *Meachem* (1907) 49 Ore. 186, or an indorsee with notice. *Union Trust Co.* v. *McGinty* (1912) 212 Mass. 205: *National Citizens' Bank* v. *Toplitz* (N. Y. 1903) 81 App. Div. 593; *Richards* v. *Market Exchange Bank* (1910) 81 Oh. St. 348. The distinction adopted in the principal case between a holder in due course and a payee as affected by § 58 has been made in at least one other jurisdiction. *Fullerton Co.* v. *Snouffer* (1908) 139 Ia. 176. The effect of it, however, is to make the defense as available under the Act as it was before, for if it is good against a payee because he is not a holder in due course, it should be equally available against an indorsee with notice.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—NOTICE OF INFIRMITY. —In an action by an indorsee of a note as a *bona fide* holder for value, *held,* any circumstances which would have placed a reasonable man on guard in purchasing negotiable paper are sufficient to constitute notice of a defect to the purchaser so as to defeat a recovery by him. *Fidelity Trust Co.* v. *Mays* (Ga. 1914) 83 S. E. 961.

A holder of a note intervened to prevent a deed, given as security, from being set aside as fraudulent. *Held,* actual knowledge of the fraud, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is required to defeat the intervener. *Smathers & Co.* v. *Toxaway Hotel Co.* (N. C. 1914) 83 S. E. 844.

An early English case announced the doctrine that if negotiable paper was purchased under circumstances which would excite the suspicions of a prudent and careful man, the purchaser could not recover. *Gill* v. *Cubitt* (1824) 3 B. & C. 466. This rule, which was contrary to the previous doctrine in England, *Lawson* v. *Weston* (1801) 4 Esp. 56, was soon discarded, and the former test of actual bad faith on the purchaser's part was restored. Under this rule suspicious circumstances, or even gross negligence would not defeat the rights of a purchaser for value. *Backhouse* v. *Harrison* (1834) 5 B. & A. 1098; *Goodman* v. *Harvey* (1836) 4 A. & E. 870. The Georgia case, following the test in *Gill* v. *Cubitt,* finds support in several jurisdictions in America, *Roth* v. *Colvin* (1859) 32 Vt. 125, 135; *Mee* v. *Carlson* (1908) 22 S. Dak. 365; see *Citizens' Bank* v. *Leonhart* (1890) 126 Ind. 206, but the great weight of authority supports the rule as stated in the North Carolina case. *Goodman* v. *Simonds* (1857) 20 How. 343, 366; *Magee* v. *Badger* (1866) 34 N. Y. 247; *Hamilton* v. *Voight* (1870) 34 N. J. L. 187; Negotiable Instruments Law, § 56. This rule fosters a freer circulation of negotiable instruments, furnishes a clearer and simpler question for the jury, and, keeping in mind that the negligence or carelessness of the purchaser may be evidence of his bad faith, see *Canajoharie Nat. Bank* v. *Diefendorf* (1890) 123 N. Y. 191; *Goodman* v. *Harvey, supra,* would seem to be the better test in determining the rights of the holder.

REAL PROPERTY—INCHOATE RIGHT OF DOWER AS BASIS OF ACTION TO RESTRAIN WASTE.—The plaintiff's husband deserted her and conveyed his lands to the defendant. The plaintiff, who had not joined in the deed, brought action to restrain the defendant from drilling oil and gas wells, on the theory that he was committing waste and injuring her dower right. *Held,* the action was not maintainable. *Rumsey* v. *Sullivan* (N. Y. App. Div. 4th Dept. 1914) 150 N. Y. Supp. 287.

While before it is assigned, dower is often spoken of as a mere chose in action, see *Rogers* v. *Potter* (1866) 32 N. J. L. 78, 84, 86, and falls short of an estate in land, nevertheless it constitutes an incumbrance on the property, *Porter* v. *Noyes* (1822) 2 Me. 22; 2 Scribner, Dower (2nd ed.) 6; see note 11 American Decisions, 39, and may be asserted during coverture, if the husband before marriage conveyed his property in fraud of the wife's right. *Petty* v. *Petty* (1843) 43 Ky. 215; *Youngs* v. *Carter* (N. Y. 1877) 10 Hun 194. In so far as it lacks the characteristics of a vested estate, the inchoate right of dower may be compared with the interests of a contingent remainderman or an executory devisee, which are often protected against waste on the part of the owner of the precedent estate. *Turner* v. *Wright* (1860) 2 DeGex. F. & J. *234; *Gordon* v. *Lowther* (1876)

75 N. C. *193; *Brashear* v. *Macey* (1829) 26 Ky. *89; *Kollock* v. *Webb* (1901) 113 Ga. 762. In California similar protection has been extended to the holder of a right of entry. *Pavkovich* v. *Southern Pacific Ry.* (1906) 150 Cal. 39. While in the jurisdiction of the principal case, the legislature may abolish the inchoate right of dower, *Moore* v. *Mayor* (1853) 8 N. Y. 110, this is by no means the universal rule, *In re Alexander* (1894) 53 N. J. Eq. 96, and even in New York the right to destroy it has been limited to action on the part of the State. *Simar* v. *Canaday* (1873) 53 N. Y. 298. In view, therefore, of the substantial nature of the right and its analogy to other future interests in land, it may well be argued that the wife should be protected against third parties under the circumstances of the principal case, even while the right is inchoate, and this result has been reached in at least one jurisdiction. *Brown* v. *Brown* (1912) 94 S. C. 492. It must be admitted, however, that she could not seek such relief against the husband, and it is hard to see how her inchoate right is increased by any alienation of his rights in the property.

Suretyship and Guaranty—Notice of Principal's Default.—In an action on a note conditioned to become void upon the payment of another, *held,* since the makers of the latter note were guarantors of the first, they were entitled to no notice of their principal's default. *Masters* v. *Boyes* (Okla. 1914) 145 Pac. 363.

Cases relieving a guarantor from liability when unnotified of his principal's default have arisen from various misconceptions of the character of the obligation assumed by a guarantor. Some courts have shown a tendency to confuse it with that of an indorser of negotiable paper. *Reynolds* v. *Edney* (N. C. 1861) 8 Jones 406; see *Heyman* v. *Dooley* (1893) 77 Md. 162. Others have thought that the default of the principal lay peculiarly within the knowledge of the guarantee and that consequently notice thereof should be given to the guarantor within a reasonable time. *Globe Bank* v. *Small* (1845) 25 Me. 366; 2 Daniel, Negotiable Instruments (6th ed.) § 1787. The judges seem to have been influenced by the fact that a contract of guaranty is only a secondary and collateral one. They failed to recognize the further fact that a promise of guaranty may be absolute and that then the default of the principal in itself constitutes the condition precedent upon which an absolute liability is to arise. *Hungerford* v. *O'Brien* (1887) 37 Minn. 306. When a man unconditionally guarantees the performance of a definite contract, whether it be for the doing of acts or the payment of money, he in fact promises that the obligations of that contract will be lived up to, and from the very nature of such a promise flows the duty of finding out whether or no they are lived up to. *Hubbard* v. *Haley* (1897) 96 Wis. 578. From the earliest times, therefore, it has been held by the great weight of authority to be unnecessary to give notice to a guarantor of his principal's default. *Brookbank* v. *Taylor* (1624) Cro. Jac. 684 (2); *Barker* v. *Scudder* (1874) 56 Mo. 272; *Home Savings Bank* v. *Shallenberger* (1914) 95 Neb. 593; Spencer, Suretyship, § 184.

Torts—Forcible Entry and Detainer—Perfection of Entry.—The defendant, the owner of premises, entered during the absence of the plaintiff who was holding over after an expired lease, barricaded the entrance and forcibly resisted the plaintiff's attempt to re-enter. *Held,* the defendant's entrance, though not in itself forcible, must

be viewed in connection with his subsequent acts in forcibly maintaining the possession so gained, and so regarded, these acts constituted forcible entry. *Hammond Savings & Trust Co.* v. *Boney* (Ind. 1915) 107 N. E. 480. See Notes, p. 348.

TRUSTS—INVESTMENT OF FUNDS—PROFITS OF TRUSTEE.—A testamentary trustee invested part of the trust funds in notes sold by a firm of which he was a member. The notes had been obtained by the firm from third parties at a small profit. *Held,* the trustee must pay over such profits to the beneficiaries. *Magruder* v. *Drury* (1914) 35 Sup. Ct. Rep. 77.

The general rule both in England and in this country is that a trustee may not deal with the trust property so as to benefit himself financially, *Aberdeen Town Council* v. *Aberdeen University* (1877) L. R. 2 App. Cas. 544; *Jacobus* v. *Munn* (1883) 37 N. J. Eq. 48; *Linsley* v. *Strang* (1910) 149 Ia. 690, and it is no defense to prove that the interests of the beneficiary are in no wise injured or that the trustee is innocent of fraud. *White* v. *Sherman* (1897) 168 Ill. 589; see *Munson* v. *Syracuse etc. R. R.* (1886) 103 N. Y. 58, 74. In a few instances, however, courts have relaxed this rule; as, for example, where the trustee by reason of his position is elected president of some company in which the trust estate controls a large share of stock, or collects a fee from some third party or because of his help in the advantageous sale of the property receives a share of the broker's commission. *Lafferty's Estate* (1893) 2 Pa. Dist. 215; *Young* v. *Barker* (N. Y. 1910) 141 App. Div. 801; *Hecksher* v. *Blanton* (Va. 1910) 66 S. E. 859. While in all these cases the trustee's profit was either only very remotely the result of his administration of the trust or amounted to a gratuity, see *Whitney* v. *Smith* (1869) L. R. 4 Ch. App. 513; *Aetna Ins. Co.* v. *Church* (1871) 21 Oh. St. 492, it must be admitted that they tend to blur the sharp outlines of a well established rule of law founded on sound public policy, that all profits in the management of trust property be paid to the beneficiary, see *Smelting Co.* v. *Reed* (1897) 23 Colo. 523, and for this reason the principal case seems correct in refusing to allow any departure from the rule.

WATERS AND WATER COURSES—EASEMENTS—EQUITABLE ESTOPPEL.—An owner of land allowed a club to construct a dam, and by written agreement gave the club exclusive fishing rights in a slough thus created, also reserving a fishing right to himself in the water on his land. A subsequent owner thereupon made extensive improvements for fishing. *Held,* reciprocal rights arose and the club was liable in damages for having subsequently cut the dam and drawing off the water. *Thomas* v. *Fin & Feather Club* (Tex. 1914) 171 S. W. 698.

It is elementary that an owner of a prescriptive right may omit to use it entirely. *Brace* v. *Yale* (1868) 99 Mass. 488. If, however, an artificial condition of flowing water be maintained throughout the prescriptive period, the owner of the servient tenement if he has made improvements on the faith of the new condition, acquires an equitable right to have such artificial condition maintained as though it were a natural one, *Mathewson* v. *Hoffman* (1889) 77 Mich. 420; *Kray* v. *Muggli* (1901) 84 Minn. 90; *Smith* v. *Youmans* (1897) 96 Wis. 103; Jones, Easements, § 808, and all subsequent grantees of the dominant or servient tenement are respectively subjected to and protected by the easement on the theory that they are in privity with the original

parties. At common law the cases in which a negative easement could be acquired were extremely few, and it was never recognized as possible of acquisition in water courses, and thus, if the doctrine of "reciprocal rights" rests upon any theory of the acquisition of a negative easement in the artificial condition, it must of necessity fall. *Cf. Mason* v. *Shrewsbury etc. Co.* (1871) L. R. 6 Q. B. 578. The only theory upon which the cases can be supported is that the owner of the dominant tenement cannot be suffered to restore the flowing water to its natural condition if the owner of the servient tenement has on the faith of and in reliance upon the artifical condition made extensive improvements to meet the change of condition, see *Woodbury* v. *Short* (1845) 17 Vt. 387; *Ford* v. *Whitlock* (1855) 27 Vt. 265, and then, of course, it should become immaterial whether or not the owner of the dominant tenement has in fact acquired a prescriptive right. The principal case applies this reasoning to an action at law, and reaches its conclusion on the further ground that, since the agreement ran with the land, the grantee of the original owner should be allowed damages for its breach.

WATERS AND WATERCOURSES—MUTUAL IRRIGATION COMPANIES—WATER RIGHTS APPURTENANT TO LAND.—The certificates of a mutual ditch company provided that the holder should be entitled to a specific volume of water for each share held, so long as he should use the water on the land described on the back of the certificate. *Held,* the water rights represented by the certificate were appurtenant to the land described therein. *Berg* v. *Yakima Valley Canal Co.* (Wash. 1915) 145 Pac. 619.

Shares of stock in a mutual ditch company represent both ownership in the ditch and a right to the use of a definite quantity of water. 3 Kinney, Irrigation & Water Rights (2nd ed.) § 1485. Water rights represented by shares of stock in one of these mutual corporations are transferrable by two methods. The shares in such a company are regarded as personal property, *Tregear* v. *Etiwanda Water Co.* (1888) 76 Cal. 537; *Watson* v. *Molden* (1905) 10 Ida. 571, and an assignment thereof or a transfer on the books of the corporation, is considered sufficient to pass title to the water rights, see *Snyder* v. *Murdock* (1899) 20 Utah 419; *Cache La Poudre Irrigation Co.* v. *Reservoir Co.* (1898) 25 Colo. 144, which the new owner may apply on any land and for any purpose that he may choose. *George* v. *Robison* (1901) 23 Utah 79. On the other hand, while it is recognized that the stock itself may not be regarded as appurtenant to the land upon which the water is beneficially used, *Wells* v. *Price* (1899) 6 Ida. 490; *Oppenlander* v. *Left Hand Ditch Co.* (1892) 18 Colo. 142, the weight of authority supports the principal case in maintaining that the water rights may, upon conveyance of the stockholder's land, pass to the purchaser as an appurtenance thereto. *Graham* v. *Pasadena Land & Water Co.* (1908) 152 Cal. 596; *Brockman* v. *Grand Canal Co.* (1904) 8 Ariz. 451. Whether or not, in a particular case, the water rights are easements appurtenant, is always a question of fact, depending on the intent of the parties as expressed in the deed or implied from surrounding circumstances. See *Ruhnke* v. *Aubert* (1911) 58 Ore. 6; *Spurgeon* v. *Santa Ana etc. Co.* (1898) 120 Cal. 71.

WILLS—EXEMPT PROPERTY—APPROPRIATION.—After a general direction to pay debts, a testator bequeathed the residue of his estate to his

wife. *Held,* the payment of debts was not charged upon the proceeds of insurance policies which by law were exempt. *German-American Bank* v. *Godman* (Wash. 1915) 145 Pac. 221.

Since the exemption of property from the payment of debts is entirely a creature of statute, see *Fink* v. *Fraenkel* (1891) 14 N. Y. Supp. 140, the decisions on the subject must be interpreted in the light of the controlling statutes. Where property is expressly exempted for the benefit of the debtor's family, his right to waive such exemption has been denied. *Burke* v. *Finley* (1893) 50 Kan. 424. It has been said that the underlying principle of all exemption laws is the benefit and support of the debtor's family; see *Wright* v. *Pratt* (1872) 31 Wis. 99, 104; *Wilcox* v. *Hawley* (1864) 31 N. Y. 648, 657; and yet many courts have held it to be a personal privilege which the debtor may claim or waive at his pleasure. *Hewes* v. *Parkman* (1838) 37 Mass. 90; *Spitley* v. *Frost* (C. C. 1883) 15 Fed. 299, 304. Even recognizing the right of the debtor to waive exemption in his lifetime, it hardly seems that his widow and family, for whose benefit the exemption continues after his death, *Becker* v. *Becker* (N. Y. 1866) 47 Barb. 497, should be deprived of the benefit of the law by allowing him, in his will, to appropriate the exempt property to the payment of his debts. Nevertheless, it seems to be recognized that he can do so. *Union Trust Co.* v. *Cox* (1902) 108 Tenn. 316; *Schnabel* v. *Schnabel's Exrx.* (1900) 108 Ky. 536. According to the general rule, the intention of a testator to charge his real estate as the primary fund for the payment of his debts must be unequivocally expressed, and will not be presumed from a mere general direction to pay debts. *Matter of City of Rochester* (1888) 110 N. Y. 159; *Cooch's Exr.* v. *Cooch's Admr.* (Del. 1879) 5 Houst. 540, 567; *Harmon* v. *Smith* (C. C. 1889) 38 Fed. 482. It seems the courts should be just as slow to ascribe to the testator an intention to charge his debts on his exempt property and thus deprive his family of the benefits of the exemption. *Larson* v. *Curran* (1913) 121 Minn. 104; *Cross* v. *Benson* (1904) 68 Kan. 495; *contra, Union Trust Co.* v. *Cox, supra.*

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.—The plaintiff was rendered incompetent to testify to personal transactions with the defendant's grantor by reason of the latter's death. A transcript of the plaintiff's testimony concerning such transaction, given at a former trial while the grantor was alive and present, was offered in evidence. *Held,* the transcript was admissible. *New* v. *Smith* (Kan. 1915) 145 Pac. 880.

In general, former testimony or a deposition competent when given, are admissible on a subsequent trial, although the witness has since become disqualified by reason of insanity, *Marler* v. *State* (1880) 67 Ala. 55, or of interest, *Sabine* v. *Strong* (1843) 47 Mass. 270, or by statute. *Wells* v. *Insurance Co.* (1898) 187 Pa. 166; but see *Goldstein* v. *State* (Tex. 1914) 171 S. W. 709. Where, however, a survivor is rendered incompetent by statute to testify to transactions with a deceased party, see N. Y. Code Civ. Proc. § 829, a majority of the courts have excluded his testimony or deposition, though given during the lifetime of the deceased, on the ground that the witness testifies at the time when the testimony is read at the trial, and not when such testimony was given. *Zane* v. *Fink* (1881) 18 W. Va. 693, 747; *Greenlee* v. *Mosnat* (1907) 136 Ia. 639; *Boyd* v. *Gore* (1910) 143 Wis. 531. These courts deny the analogy of such cases to those where the wit-

ness is rendered incompetent by insanity or interest, and hold that since the object of the disqualification is to preserve absolute equality between the parties, to admit such testimony would contravene the spirit of the statute. The ground of disqualification under consideration is the only survival of the common law rule that interest rendered a witness incompetent, and has been severely criticized as being of doubtful expediency. 1 Wigmore, Evidence, § 578. Since the deceased has full opportunity to cross-examine the witness, and since admission of the testimony throws important light upon the transaction, the view taken by the court in the principal case that the testimony is admissible, and that the test of competency is to be applied at the time it is given, seems preferable. *Armitage* v. *Snowden* (1874) 41 Md. 119; *Pratt* v. *Patterson* (1876) 81 Pa. 114; *Rice* v. *Motley* N. Y. (1881) 24 Hun 143.

Witnesses—Privilege Against Self-Crimination—Waiver.—A person had voluntarily appeared and testified before a committing magistrate as to a crime alleged to have been committed by himself and other parties. At a subsequent trial of one of the parties, he asserted his privilege of refusing to testify. *Held,* the waiver of privilege at the preliminary hearing did not waive it for other trials. *People* v. *Cassidy* (1915) 213 N. Y. 388. See Notes p. 340.